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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 128 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHAMMED YUNUSKHAN MIYASHERKHAN PATHAN
Versus
AMC

Appearance:
MR GM JOSHI for Petitioner
MR PRASHANT G DESAI for Respondent No. 1
RULE SERVED for Respondent No. 2
MR AJ MEMON for Respondent No. 6, 9,10,11

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE B.C.PATEL

Date of decision: 10/05/2000

C.A.V. JUDGEMENT (Per Patel, J.)

This Public Interest Litigation is filed on account of inaction on the part of Respondents No. 1 to 4 under the provisions contained in the Urban Land (Ceiling & Regulation) Act, Gujarat Town Development Act and Bombay Provincial Municipal Corporations Act, 1949.

2. Short facts which are required to be considered for disposal of this petition are as under:

2.1 Vatva area, now a part of Ahmedabad City was formerly a part of the Ahmedabad District. At that time, the village Panchayat was required to look after the civic amenities of the citizens residing in the area. Large number of small factories and industries have been established in the Vatva area. Limits of Ahmedabad City came to be extended in 1989 as a result of which the area of village Vatva came to be included in the limits of Ahmedabad City.

2.2 The petitioner has pointed out that residential and commercial buildings are constructed illegally in the agricultural land without getting permission for non-agricultural use from the competent authorities under the Gujarat Town Planning & Urban Development Act, 1976 or Bombay Provincial Municipal Corporations Act, 1949 (for short, BPMC Act). Builders, head-strong persons and the persons working in the offices of the respondents No. 1 to 3 have allowed the development of the area illegally by allowing illegal construction of residential and commercial buildings.

2.3 It is averred in the petition that the lands bearing survey Nos. 855, 856 and 857 are agricultural lands and are of private respondents, viz. respondents No. 6 to 11. As averred in the petition, these survey numbers, as a matter of fact, are owned by a Public Trust which is known as Pir Kutube Alam Dargah. The petitioner has averred that he is not aware about the disputes between the private respondents and the said Trust but he has stated that large scale construction activities commenced on these survey numbers. It is specifically alleged in the petition that about 2000 small houses comprising of one room and kitchen have been constructed by respondents No. 6 to 11. It is further averred in the petition that the purchasers are duped by purchasing this small houses. It is apprehended that large number of people occupying such houses would create acute problems insofar as water and other civic amenities are concerned. It may also create problems with regard to

drainage. It is pointed out that as a matter of fact, water being used by the residents of these illegally and unauthorisedly constructed houses is causing serious problems to the citizens of this area.

2.4 It is further averred that the people belonging to the weaker sections of the Society are duped in purchase of this small houses which are constructed illegally and occupation and use by weaker sections is generally being used as a shield for the purpose of regularisation of illegal constructions. The petitioner, being an ordinary resident of Vatva, realising the difficulties that are being faced and the difficulties that are likely to faced in future by the people of this area made inquiries with the concerned authorities and found that the lands in question are earmarked for agricultural use. He has stated that the private respondents have not taken any permission from the Collector for making the use of the land for non-agricultural purposes and thus there is gross violation of the provisions contained in the Land Laws. When large number of houses are being constructed, as averred by the petitioner, it is not possible to believe that the authorities would be unaware about the same.

2.5 It is submitted by the petitioner that for the sake of arguments even if it is believed that the private respondents are the owners of the property, then also considering the area they were required to file declarations as contemplated under the provisions contained in the Urban Land (Ceiling and Regulation) Act, 1976. If that be so, the private respondents were required to take a permission from the competent authority under the aforesaid Act. According to the petitioner there is neither declaration nor permission to use the land as envisaged in Urban Land (Ceiling & Regulation) Act.

2.6 The petitioner, in this background, submitted that the respondent authorities have failed in performing their statutory duties. It is a case of inaction on the part of the statutory authorities and the statutory authorities have abated the private respondents in committing the illegal acts and omissions.

3. On 27.1.1999, a Division Bench of this Court issued notice to respondents No. 6 to 11 which was made returnable on 10.3.1999. Mr. A.J. Memon, learned advocate appeared before the Court on 10.3.1999 and requested the Court to adjourn the matter. Thereafter the Court issued notice to respondents No. 1 to 5, and

thereafter, considering the affidavits, the Court issued Rule and notice as to interim relief which was made returnable on 22.11.1999. This Division Bench thereafter directed the office to put up the matter for final hearing in the first week of April 2000.

4. Respondent No.10 Sirajuddin Kutuddin has filed a reply in the matter. It is submitted by him that the petition is not filed in public interest against the construction and has further stated that the petition is nothing but an attempt to create problems for the poor and needy people who are given shelter in the suit land. It is further averred that about 150 poor families who were uprooted from Chartoda Kabarstan lands have settled on the suit lands. (Some other persons also have purchased the plots which form part of the suit lands is not referred by the deponent). It is suggested that the owners of the land have executed an agreement to sale on 16.7.1998 in favour of (1). Sharifkhan Navabkhan Pathan, residing near Shahalam Roza, Ahmedabad, (2). Aarifbhai Husainbhai Kureshi, residing at 20 Aleef Apts., Danilimda village, Ahmedabad, (3). Sajid Yunusbhai Memon residing at Patel Vas, Danilimda, Ahmedabad, (4). Shah Najurkhan Saida Azimkhan Pathan residing at Golden Park, Vatva, and, (5). Shafakhatali Gulamali Saiyad residing at Opp. Roza, Vatva. The deponent has admitted that they agreed to sell the suit lands to the aforesaid persons by much reduced price though other parties offered much higher price for the suit land. It appears that the suggestion made by the respondent No. 10 is that the purchasers assured that the suit land will be made available for housing accommodation to poor and needy people of the community and infact, has further stated in the affidavit that 150 families have been provided accommodation. It is in view of this the deponent has stated that the petition is not filed in public interest.

5. It is required to be noted that neither the respondents No. 6 to 11 nor their advocates remained present at the time of hearing of this matter. They have filed no reply to the affidavit filed on behalf of the Ahmedabad Municipal Corporation.

6. On behalf of the Ahmedabad Municipal Corporation, affidavit is filed by Town Development Officer. In the affidavit it is pointed out that in the disputed survey number No. 855 and 857, as it was found that persons have commenced illegal construction, injunction orders under section 267 of the BPMC Act were issued on different dates to the persons concerned. It is further pointed out that the Corporation posted security guards

with a view to restrain them from further construction. Notices under section 261.A of the BPMC Act were issued on 1.2.1999 and 21.5.1999. No reply was received from anyone. Thereafter, the Corporation issued orders under section 260 (2) of the Act on various dates i.e. 26.3.1999 and 17.8.1999 for removal of unauthorised constructions. It is pointed out in the affidavit that these orders were challenged by filing various Civil Suits before the City Civil Court without issuing statutory notice. Subsequently, the suits were withdrawn and again suits were filed. Copies of notices are placed on record. From the notice it appears that the persons concerned were not engaged in construction of houses for weaker sections but infact they were found constructing row houses, eight in number. There is a report made by the Town Development Inspector which is placed on record. From that report it appears that the construction commenced without permission of the Municipal Corporation. From the report it also appears that survey No. 856 and 857 were shown in the names of (1). Jallauddin Kutubddin, (2). Sirajuiddin Kutubddin (3). Nazruddin Kutubddin, (4). Kanijhussein Kutubddin, (5). Vazirbibi Kutubddin, (6). Badrunissa Kutubddin, and (7) Umarbhai Kureshi. (It may be noted that respondents Nos. 6 to 11 stated that there was an agreement to sale and reading the affidavit it is clear that no such agreement is executed in favour of these persons). In the report there is also a sketch. Looking to the report it appears that the construction of row houses is without permission and the row house admeasure 25.90 X 3.90 mtrs. No counter is filed by any of the private respondents to the affidavit filed by the Town Development Officer.

7. From the record, it is very clear that no evidence is produced before the Corporation indicating that the land in question where the construction is being carried out belong to the persons for whose benefit the construction is being carried out. No application is given to the Corporation indicating intention to carry out any construction. Permission is required for commencing any construction activities, before the commencement of any construction. Even earlier notices have been issued restraining them from continuing with the construction any further. Notice under section 260(2) further indicates that a decision has been taken to demolish the construction being illegal and the aforesaid six persons were called upon to show cause as to why the construction should not be demolished. It appears that under the orders of the Court the aforesaid persons continued the illegal construction activities. From the list enclosed with the affidavit of the

Corporation it appears that under the orders obtained from the Court below the illegal construction activities commenced and continued without obtaining permission.

8. The trial Court, while passing an order in such matters should, instead of granting exparte ad-interim orders, should call upon the respondents/authorities if the Court is prima facie of the opinion that there is much substance in what the applicant states. Powers conferred upon the authorities have to be exercised after following the procedure contemplated. Therefore, before restraining the authorities, it is necessary for the plaintiffs to point out primafacie that no illegality has been committed by them. The plaintiffs should produce evidence indicating that they are the owners and/or authorised occupiers of the land and that the construction commenced only after obtaining due permission from the Corporation. The Courts cannot take a very casual approach in granting exparte ad-interim orders.

9. It is required to be noted that the lands being costlier the prices have been shot up like anything. Inflow to cities from rural areas may be responsible for urbanisation. People are in need of housing accommodation. However, when under the law duty is cast upon the local authorities to grant permission for construction if it is in accordance with law. The Court has to consider whether the construction which is being carried out by the persons is in accordance with law or not. If the court decides this point against the plaintiff after the construction is completed, then in such case, the Court is required to pass an order of demolition of the construction which would be waste of money, energy and property. Even others who may subsequently occupy may suffer. Innocent, needy persons who have migrated to the City are duped to buy such property or are systematically inducted in the property. it is very likely that if the Court on evidence is required to dismiss the suit, such persons are likely to be affected adversely. It is no doubt true that buyer must inquire about the right and title of the property and this would also include in cases of constructed property, constructed in accordance with the laws. If the property is not constructed in accordance with law, the occupier will be the sufferer. Therefore in such a situation it is more desirable for the Court to wait for some time, and on evidence being placed before it, only after satisfying, should pass an order, and not casually.

10. In the instant case, as indicated, it appears

from the affidavit filed by the private respondent that some part of the suit land was agreed to be sold in favour of Sharifkhan Navabkhan Pathan and others. Respondent No.10 has further stated in his affidavit that those people who purchased the land were required to construct houses for the poor persons, and, therefore, they agreed to sell the land at much lower price. The documents produced by the Corporation indicates to the contrary. Row Houses are being constructed and that too of size admeasuring 104 sq. mtr. approximately of plinth area and the total construction of each row house would be much more. When property is not transferred in accordance with law, how the person in possession can commence the construction work without plan being approved.

11. We are also compelled to say few words about the attitude of the officers of the local authorities. In several matters, the officers of the local authorities fail to take prompt actions. In metropolitan and other large cities, day by day illegal construction activities are found increasing. It is the duty of the highly paid officers of the local authorities to be more vigilant and careful and more attentive towards their duties. From the facts of this case, it appears that after the TDO has filed the affidavit, the Corporation has not done anything. Learned advocate for the Corporation was not in a position to point out as to why, for restraining the illegal construction, further proceedings have not been initiated before the higher forum. Learned advocate appearing for the petitioner submitted that as the officers of the Corporation have joined hands with Sharifkhan Navabkhan Pathan and others, they would not bother to challenge the order passed by the trial Court. We are of the opinion that looking to the facts and circumstances of the case, it is very clear that the officers of the Corporation have remained actively silent and except paper work and objection on paper, have not done anything. Respondents No. 6 to 10 even have not bothered to file further affidavit giving reply to the affidavit filed on behalf of Ahmedabad Municipal Corporation and if that be so, there is no reason for this Court not to accept the averments made in the affidavit filed by the Town Development Officer pointing out that illegal constructions commenced by the private respondents and as Corporation has remained mere spectator after certain stage, it would not be improper to draw an inference that the work continued with the consent or connivance of the officers. When there is only an agreement to sell, property does not pass. How one would permit to construct is the real question and

from conduct, it is clear that the construction work is unauthorised, illegal and in contravention of the provisions contained in the BPMC Act.

12. It is required to be noted that when a person is constructing a building, it is incumbent upon him to approach the local authority or any other appropriate authority for approval of a plan for the purpose construction of a building and only after permission being granted as per the approved plan, construction is to be carried out. If the person is investing money in construction without obtaining prior permission of the authorities, he is taking the risk. When the law has made it very clear that construction can be made only after approval is granted by local authority, i.e. in the instant case Ahmedabad Municipal Corporation, it is the bounden duty of the respondent authority, i.e. Municipal Commissioner not to permit any unauthorised construction within the area of the Corporation. The local body has to grant permission only after being satisfied about the conditions as envisaged in bylaws and rules. If every one is permitted to construct houses according to the sweet will, it will create chaos in the society. Under the Town Development Act and the BPMC Act, Municipal Commissioner of Ahmedabad Municipal Corporation is required to allow to raise construction only in accordance with law.

13. It is required to be noted that the BPMC Act is applicable in the area to solve the problems arising in the area and not to create. There are building regulations which contemplate that the person intending to make a building has to give a notice to the Municipal Commissioner of his intention, in the prescribed form. Whatever information as may be required to be furnished under the byelaws is to be furnished. Even for addition or alteration etc. notice is required to be given to the authority. Plans are to be accepted provided the same are drawn, prepared and signed in the manner prescribed in the byelaws. Even after the commencement of the work, supervision of a building is contemplated in section 254 of the BPMC Act. If permission is obtained by mis-representation, such permission can be cancelled and any work done, shall be deemed to have been done without permission. Thus the powers exercised under section 268 are not to be interfered lightly. Inspection of building in course of erection, alteration etc. is contemplated under section 259 of the Act. Section 269 contemplates proceedings to be taken in respect of building or work commenced contrary to the rules or byelaws. The legislature has thus cast a duty on the Municipal

Commissioner to see that the building work is not commenced without approval of plan and is completed in accordance with the rules and byelaws as per approved plan. Looking to the language of section 260, it appears that the legislature has empowered the Commissioner to take action with a view to see that anyone is constructing a building, is constructing strictly in accordance with by-laws. All are to be treated equally and for use of the land, there should be no discrimination in allowing the use of property. It is the duty of the Commissioner to see that there is enforcement of the provisions concerning building and building works. A person has to commence the construction as per the approved plans only. If the construction is as per the plans approved by the Corporation, then such construction can be said to be in accordance with law. Provisions are also made to regularise for safety, health and well-being of the inhabitants of the area. This provision is not to be understood as a provision to regularise illegal, unauthorised construction. If the authorities are changing the floor space index according to sweet will of certain persons or the authorities are regularising unauthorised constructions, the same would be illegal, contrary to law and would amount to defeating the provisions of law. By exercising the powers not vested, unauthorised constructions cannot be regularised. These provisions are required to be read in such a manner so as to see that the intention of the legislature is met with and not frustrated. These provisions are to be understood for the betterment of the Society and are to be interpreted so as to achieve the object and not to frustrate the object.

14. It is well settled that when a question of construction comes before the Court, intention of the legislature as expressed must be given effect to and must be expressed by the Court in the language of the section or provision. If according to a citizen the Municipal Commissioner has rejected his application for construction, then the remedy is provided. It would be open for him to approach the appropriate forum, but he cannot commence construction work without prior permission. The trial Court should not pass mandatory order so that the construction is completed before the suit is disposed of. Even after appearance by the Local Authority, the Court must examine strictly whether there is compliance of all the rules/byelaws or not. If Court thinks it reasonable, then it must proceed with the suit, instead of granting an injunction or stay order. The Court granting injunction must realise that by the time

the suit is heard, construction will be completed and right may be created in favour of third parties and that would put such parties to inconvenience. It must be borne in mind that the authorities are required to act in accordance with law, and if the Court is satisfied that the authorities, instead of acting in accordance with law wrongly withheld the permission, then the Court must proceed with the matter day to day instead of granting any order so as not to cause serious prejudice to the third parties. Bye laws/Rules for erection or alteration of a building are in the interest of general public. Duty is cast on the officers exercising the powers keeping in mind the provisions of the Act. Ordinarily, presumption is that the official acts performed in discharge of the duties are performed in accordance with law. Therefore, there must be evidence to rebut such presumption. By statement and nothing more, presumption is not rebutted. There must be sufficient evidence and therefore it would be proper for the Court hearing application to proceed with the suit, rather than granting the application. Now a days suits are not disposed of within a reasonable period for various reasons. When a suit in such a case is placed for hearing after completion of construction, the owner and builder may not be interested as after erection of a building, the builder/owner would transfer the property and the occupiers may have to suffer later on. Thus, with a view to see that innocent purchasers/occupiers may not be the sufferer in case suit is dismissed, the Court, considering the interest of innocent transferees, must proceed with the suit, instead of granting interim relief.

15. It is the duty of the Court below to examine the Act, rules, and byelaws made under the Act and thereafter to decide the suit. The Court cannot hold that the Municipal Commissioner has illegally withheld permission of construction soon after the plaint is presented. That order can be passed only at the end of a full-fledged trial. In any event, we are of the opinion that when the Corporation has restrained a person from continuing construction by issuing a notice, it is not advisable for the Courts to pass orders which would assist the unauthorised occupant of the land or persons constructing unauthorisedly to complete the unauthorised construction.

16. The Apex Court in the case of M.I. BUILDERS PVT. LTD. vs. RADHEY SHYAM SAHU reported in 1999 (6) SCC 464 has pointed out that unauthorised construction should be demolished eventhough the builder has invested considerable amount. The Apex Court pointed as under in

paragraph 73 (pg. 529):

"This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."

17. Mr. Joshi learned advocate submitted that the petitioner has no interest whatsoever either in the property which is being constructed by the builders illegally, or has no interest whatsoever in the land. He submitted that he is a resident of village Vatva and on account of unauthorised construction in the area, that has created problem for the local residents insofar as it concerns with the life and well being, traffic and public or civic amenities are concerned. He submitted that he has filed this petition only for the betterment of the Society and public at large, and not for benefitting himself or any other individual personally. He submitted that despite the fact that on the record it has been placed that the construction is being carried out without the authority or permission, it must be stopped atonce and no one should be allowed to construct without prior approval of the authorities concerned.

18. In view of the fact that the construction is being carried out without permission granted by the Corporation, it is directed that the respondent Corporation shall not permit the respondents or any one else to raise any further construction in the said plots and shall not regularise any construction constructed so far. It is further directed that if any essential supply is provided by the Corporation, it shall atonce be

disconnected.

19. Ahmedabad Electricity Company, having its office at Lal Darwaja, Ahmedabad though not a party to this proceedings, in view of the unauthorised construction, is directed not to supply electric energy to the occupants of unauthorised structures in the suit land, (Survey No. 855 and 857, Vatva) and if it is already supplied, it

20. This petition stands allowed with the aforesaid directions. Rule is made absolute in the aforesaid terms. No order as to costs.

Registry is directed to issue writ to Ahmedabad Electricity Company as per paragraph 19 of this judgment.

(D.M. DHARMADHIKARI, CJ)

csm./ (B.C. PATEL, J.)